

THE AMERICANS WITH DISABILITIES ACT

Your Responsibilities As An Employer

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The Office of Handicapped Concerns, to help you with the ADA law, has reprinted this booklet. The information in this booklet has come from the U.S. Equal Opportunity Commission.

Introduction

The Americans with Disabilities Act of 1990 (ADA) makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA also outlaws discrimination against individuals with disabilities in State and local government services, public accommodations, transportation and telecommunications. This booklet explains the part of the ADA that prohibits job discrimination. The U.S. Equal Employment Opportunity Commission (EEOC) and State and local civil rights enforcement agencies that work with the Commission enforce this part of the law.

Are You Covered?

Job discrimination against people with disabilities is illegal if practiced by:

- ✓ private employers,
- ✓ state and local governments,
- ✓ employment agencies,
- ✓ labor organizations, and
- ✓ labor-management committees.

The part of the ADA enforced by the EEOC outlaws job discrimination by:

- ✓ all employers, including state and local government employers with 15 or more employees after July 26, 1994.

Another part of the ADA, enforced by the U.S. Department of Justice (DOJ), prohibits discrimination in state and local government programs and activities, including job discrimination by all state and local governments, regardless of the number of employees, after January 12, 1992.

Because the ADA gives responsibilities to both EEOC and DOJ for employment by state and local governments, these agencies will coordinate the federal enforcement effort. In addition, since some private and government employers are already covered by nondiscrimination and affirmative action requirements under the Rehabilitation Act of 1973, EEOC, DOJ and the Department of Labor also will coordinate the enforcement effort under the ADA and the Rehabilitation Act.

What Employment Practices Are Covered?

The ADA makes it unlawful to discriminate in all employment practices such as:

- 1) recruitment
- 2) pay
- 3) hiring
- 4) firing
- 5) promotion
- 6) job assignments
- 7) training
- 8) leave
- 9) lay-off
- 10) benefits
- 11) all other employment related activities

The ADA prohibits an employer from retaliating against an applicant or employee for asserting his rights under the ADA. The Act also makes it unlawful to discriminate against an applicant or employee, whether disabled or not, because of the individual's family, business, social or other relationships or association with an individual with a disability.

Who Is Protected?

Title I of the ADA protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he/she has **a physical or mental impairment that substantially limits a major life activity**. The ADA also protects individuals who have **a record of** a substantially limiting impairment, and people who **are regarded as** having a substantially limiting impairment.

To be protected under the ADA, an individual must have, a record of, or be regarded as having a substantial, as opposed to a minor, impairment. A **substantial** impairment is one that significantly limits or restricts **a major life activity** such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for one self, learning or working.

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation,

in order to be protected by the ADA. This means that the applicant or employee must:

- satisfy the job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job related; and
- be able to perform those tasks that are essential

The ADA does not interfere with the employer's right to hire the best-qualified applicant. Nor does the ADA impose any affirmative action obligations. The ADA simply prohibits the employer from discriminating against a qualified applicant or employee because of their disability.

How Are Essential Functions Determined?

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. The employer should carefully examine each job to determine which functions or tasks are essential to performance. (This is particularly important before taking an employment action such as recruiting, advertising, hiring, promotion or firing).

Factors to consider in determining if a function is essential include:

- ✓ whether the reason the position exists is to perform that function,
- ✓ the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
- ✓ the degree of expertise or skill required to perform the function.

The employer's judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- actual work experience of present or past employees in the job,
- time spent performing a function,
- consequences of not requiring that an employee perform a function, and
- terms of a collective bargaining agreement.

What Are An Employers Obligations To Provide Reasonable Accommodations?

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities. For example, reasonable accommodation may include:

- ✓ acquiring or modifying equipment or devices,
- ✓ job restructuring,
- ✓ part-time or modified work schedules,
- ✓ reassignment to a vacant position,
- ✓ adjusting or modifying examinations, training materials or policies,
- ✓ providing readers and interpreters, and
- ✓ making the workplace readily accessible to and usable by people with disabilities.

Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and to enjoy

benefits and privileges of employment equal to those available to other employees.

It is a violation of the ADA to fail to provide reasonable accommodation to the **known** physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship on the operation of the employers business. Undue hardship means that the accommodation would require significant difficulty or expense.

What Is The Best Way To Identify A Reasonable Accommodation?

Frequently, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious. The individual may suggest a reasonable accommodation based upon his/her own life or work experience. However, when the appropriate accommodation is not readily apparent, the employer must make a reasonable effort to identify one. The best way to do this is to consult informally with the applicant or employee about potential accommodations that would enable the individual to participate in the application process or perform the essential functions of the job. If this consultation does not identify an appropriate accommodation, the employer may contact the EEOC, state or local vocational rehabilitation agencies, or state or local organizations, representing or providing services to individuals with disabilities. Another resource is the Job Accommodation Network (JAN). JAN is a free consultant service that helps employers make individualized accommodations. The telephone number is 1-800-232-9675.

When Does A Reasonable Accommodation Become An Undue Hardship?

It is not necessary to provide a reasonable accommodation if doing so would cause an **undue hardship**. Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business. Among the factors to be considered in determining whether an

accommodation is an undue hardship are the cost of the accommodation, the employer's size, financial resources and the nature and structure of its operation.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. If cost causes the undue hardship, the employer must also consider whether funding for an accommodation is available from an outside source, such as a vocational rehabilitation agency, and if the cost of providing the accommodation can be offset by state or federal tax credits or deductions. The employer must also give the applicant or employee with a disability the opportunity to provide the accommodation or pay for the portion of the accommodation that constitutes an undue hardship.

Can An Employer Require Medical Examinations Or Ask Questions about an Individual's Disability?

It is unlawful :

- to ask an applicant whether she is disabled or about the nature or severity of a disability, or

- to require the applicant to make a medical examination before making a job offer.

The employer can ask an applicant questions about ability to perform job-related functions, as long as the questions are not phrased in terms of a disability. The employer can also ask an applicant to describe or to demonstrate how; with or without a reasonable accommodation he/she will perform job-related functions.

After a job offer is made and prior to the commencement of employment duties, the employer may require that an applicant take a medical examination if everyone who will be working in the job category must also take the examination. The employer may condition the job offer on the results of the medical examination. However, if an individual is not hired because a medical examination reveals the existence of a disability, the employer must be able to show that the reasons for exclusion are job

related and necessary for conduct of the employer business. The employer also must be able to show that there was not a reasonable accommodation that would have made it possible for the individual to perform the essential job functions.

Once the employer has hired an applicant, they cannot require a medical examination or ask an employee questions about disability unless the employer can show that these requirements are job related and necessary for the conduct of their business. The employer may conduct voluntary medical examinations that are part of an employee health program.

The results of all medical examinations or information from inquiries about a disability must be kept confidential, and maintained in separate medical files. The employee may provide medical information required by state worker's compensation laws to the agencies that administer such laws.

Do Individuals Who Use Drugs Illegally Have Rights Under the ADA?

Anyone who is currently using drugs illegally is not protected by the ADA and may be denied employment or fired on the basis of such use. The ADA does not prevent employers from testing applicants or employees for current illegal drug use, or from making employment decisions based on verifiable results. A test for the illegal use of drugs is not considered a medical examination under the ADA; therefore, it is not a prohibited pre-employment medical examination, and the employer will not have to show that the administration of the test to employees is job related and consistent with business necessity. The ADA does not encourage, authorize or prohibit drug tests.

How Will the ADA Be Enforced and What Are The Available Remedies?

The U. S. Equal Employment Opportunity Commission will enforce the provisions of the ADA, which prohibit job discrimination. After July 26, 1992, individuals who believe they have been discriminated against on the basis of their disability can file a charge with the Commission at any of its offices located throughout the United States. A charge of discrimination must be filed within 180 days of the discrimination, unless there is a state or local law that also provides relief for the discrimination on the basis of disability. In most cases where there is such a law, the complainant has 300 days to file a charge.

The Commission will investigate and initially attempt to resolve the charge through conciliation, following the same procedures used to handle charges of discrimination filed under Title VII of the Civil Rights Act of 1964. The ADA also incorporates the remedies contained in Title VII. These remedies include hiring, promotion, reinstatement, back pay, and attorney's fees. Reasonable accommodation is also available as a remedy under the ADA.

How Will EEOC Help Employers Who Want To Comply With The ADA?

The Commission believes that employers want to comply with the ADA, and that if they are given sufficient information on how to comply, they will do so voluntarily.

Accordingly, the Commission will conduct an active technical assistance program to promote voluntary compliance with the ADA. This program will be designed to help employers understand their responsibilities and assist people with disabilities to understand their rights and the law.

In January 1992, EEOC published a Technical Assistance Manual, providing practical application of legal requirements to specific

employment activities, with a directory of resources to aide compliance. EEOC will publish other educational materials, provide training on the law for employers and for people with disabilities, and participate in meetings and training programs of other organizations. EEOC staff also will respond to individual requests for information and assistance. The Commission's technical assistance program will be separate and distinct from its enforcement responsibilities. Employers who seek information or assistance from the Commission will not be subject to any enforcement action because of such inquiries.

The Commission also recognizes that differences and disputes about the ADA requirements may arise between employers and people with disabilities as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process of the ADA. Accordingly, EEOC will encourage efforts to settle such differences through alternative dispute resolution, providing that such efforts do not deprive any individual of legal rights provided by the statute.

Additional Questions And Answers On The Americans With Disabilities Act

- Q. What is the relationship between the ADA and the Rehabilitation Act of 1973?**
- A. The Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by the federal government, federal contractors and by recipients of federal financial assistance. If the Rehabilitation Act prior to the passage of the ADA covered the employer, the ADA will not affect that coverage. Many of the provisions contained in the ADA are based on Section 504 of the Rehabilitation Act and its implementing regulations. If the employer is receiving federal financial assistance and is in compliance with Section 504, the employer is probably in compliance with the ADA requirements affecting employment

except in those areas where the ADA contains additional requirements. The employer's nondiscrimination requirements as a federal contractor under Section 503 of the Rehabilitation Act will be essentially the same as those under the ADA; however, they will continue to have additional affirmative action requirements under Section 503 that do not exist under the ADA.

Q If an employer has several qualified applicants for a job, does the ADA require they hire the applicant with a disability?

A No. The employer may hire the most qualified applicant. The ADA only makes it unlawful for employers to discriminate against a qualified individual with a disability on the basis of disability.

Q One employee is a diabetic, but takes insulin daily to control his diabetes. As a result, the diabetes has no significant impact on his employment. Is he protected under the ADA?

A Yes. The determination as to whether a person has a disability under the ADA is made without regard to mitigating measures, such as medications, auxiliary aides and reasonable accommodations. If an individual has an impairment that substantially limits a major life activity, he/she is protected under the ADA, regardless of the fact that the disease or condition or its effects may be corrected or controlled.

Q One employee has a broken arm that will heal but is temporarily unable to perform the essential functions of his job as a mechanic. Is this employee protected by the ADA?

A. No. Although this employee does have impairment, it does not substantially limit a major life activity if it is of limited duration and will have no long-term effect.

Q Is an employer obligated to provide a reasonable accommodation for an individual if they are unaware of his/her physical or mental impairment?

A No. An employer's obligation to provide reasonable accommodation applies only to **known** physical or mental limitations. However, this does not mean that an applicant or employee must always inform the employer of a disability. If a disability is obvious, e.g., the applicant uses a wheelchair, the employer "**knows**" of the disability even if the applicant never mentions it.

Q How does an employer determine whether a reasonable accommodation is appropriate and the type of accommodation that should be made available?

A The requirement generally will be triggered by a request from an individual with a disability, who frequently can suggest an appropriate accommodation. Accommodations must be made on a case-by-case basis, because the nature and extent of a disabling condition and the requirements of the job will vary. The principal test in selecting a particular type of accommodation is that of **effectiveness**, i.e., whether the accommodation will enable the person with a disability to perform the essential functions of the job. It need not be the best accommodation, or the accommodation the individual with a disability would prefer, although primary consideration should be given to the preference of the individual involved. However, the employer, has the discretion to choose between effective accommodations, and may select one that is the least expensive or easiest to provide.

Q When must an employer consider reassigning an employee with a disability to another job as a reasonable accommodation?

A When an employee with a disability is unable to perform his/her present job even with the provision of a reasonable accommodation, the employer must consider reassigning the employee to an existing position that he/she can perform with or without a reasonable accommodation. The requirement to consider reassignment applies only to employees and not to

applicants. The employer is not required to create a position or to bump another employee in order to create a vacancy. Nor is the employer required to promote an employee with a disability to a higher-level position.

Q What if an applicant or employee refuses to accept an accommodation that an employer offers?

A The ADA provides that an employer cannot require a qualified individual with a disability to accept an accommodation that is neither requested nor needed by the individual. However, if a necessary reasonable accommodation is refused, the individual may be considered not qualified for the position.

Q If a business has a fitness room for its employees, must it be accessible to employees with disabilities?

A Yes. Under the ADA, workers with disabilities must have equal access to all benefits and privileges of employment that are available to similarly situated employees without disabilities. The duty to provide reasonable accommodation applies to all non-work facilities provided or maintained by the employer for their employees. This includes cafeterias, lounges, auditoriums, company provided transportation and counseling services. If making an existing facility accessible would be an undue hardship, the employer must provide a comparable facility that will enable a person with a disability to enjoy benefits and privileges of employment similar to those enjoyed by other employees, unless this would be an undue hardship.

Q If an employer contracts for a consulting firm to develop a training course for their employees, and the firm arranges for the course to be held at a hotel that is inaccessible to one of their employees, are they liable under the ADA?

A Yes. An employer may not do through a contractual or other relationship what it is prohibited from doing directly. The employer would be required to provide a location that is readily accessible to, and usable by an employee with a disability unless to do so would create an undue hardship.

Q What are an employer's responsibilities for making their facilities accessible?

A An employer, is responsible under Title I of the ADA for making facilities accessible to qualified applicants and employees with disabilities as a reasonable accommodation, unless this would cause undue hardship. Accessibility must be provided to enable a qualified applicant to participate in the application process, to enable a qualified individual to perform essential job functions and to enable an employee with a disability to enjoy benefits and privileges available to other employees. However, if the employers business is a place of public accommodation (such as a restaurant, retail store or bank) they have different obligations to provide accessibility to the general public, under Title III of the ADA. Title III also will require places of public accommodation and commercial facilities (such as office buildings, factories and warehouses) to provide accessibility in new construction or when making alterations to existing structures. Further information on these requirements may be obtained from the U. S. Department of Justice, which enforces Title III. (See page 18).

Q Under the ADA, can an employer refuse to hire an individual or fire a current employee who uses drugs illegally?

A Yes. Individuals who currently use drugs illegally are specifically excluded from the ADA's protections. However, the ADA does not exclude persons who have successfully completed or are currently in a rehabilitation program and are no longer illegally using drugs, and persons erroneously regarded as engaging in the illegal use of drugs.

Q Does the ADA cover people with AIDS?

A Yes. The legislative history indicates that Congress intended the ADA to protect persons with AIDS and HIV disease from discrimination.

Q Can an employer consider health and safety in deciding whether to hire an applicant or retain an employee with a disability?

A The ADA permits an employer to require that an individual not pose a direct threat to the health and safety of the individual or others in the workplace. A direct threat means a significant risk or substantial harm. The employer cannot refuse to hire or fire an individual because of a slightly increased risk or harm to him or others. Nor can the employer do so based on a speculative or remote risk. The determination that an individual poses a direct threat must be based on objective, factual evidence regarding the individual's present ability to perform essential job functions. If an applicant or employee with a disability poses a direct threat to the health or safety of himself or others, the employer must consider whether the risk can be eliminated or reduced to an acceptable level with a reasonable accommodation.

Q Is an employer required to provide additional insurance for employees with disabilities?

A No. The ADA only requires that the employer provide an employee with a disability equal access to whatever health insurance coverage they provide to other employees. For example, if the employer's health insurance coverage for certain treatments is limited to a specified number per year, and an employee, because of a disability, needs more than the specified number, the ADA does not require that the employer provide additional coverage to meet the employee's health insurance needs. The ADA also does not require changes in insurance plans that exclude or limit coverage for pre-existing conditions.

Q Does the ADA require that an employer post a notice explaining its requirements?

A The ADA requires that employers post a notice in an accessible format to applicants, employees and members of labor organizations, describing the provisions of the Act. EEOC will provide employers with a poster summarizing these and other federal legal requirements for nondiscrimination. EEOC will

also provide guidance on making this information available in accessible formats for people with disabilities.

For more specific information about ADA requirements affecting employment contact:

Equal Employment Opportunity Commission

1801 L Street, NW
Washington, DC 20507
1/800-669-4000 Voice
1/800-669-6820 TDD
202/663-4494 TDD for 202 Area Code

For more specific information about ADA requirements affecting public accommodations and state and local government services contact:

Department of Justice

Office of the Americans with Disability Act
Civil Right Division
PO Box 66118
Washington, DC 20035-6118
1/800-514-0301 Voice
1/800-514-0381 TDD
202/514-6193 Electronic Bulletin Board

For more specific information about requirements for accessible design in new construction and alterations contact:

Architectural and Transportation Barriers Compliance Board

1111 18th Street, NW
Suite 501
Washington, DC 20036
1/800-872-2253 Voice
1/800-872-2253 TDD

For more specific information about ADA requirements affecting transportation contact:

Department of Transportation

400 Seventh Street, SW
Washington, DC 20590
1/800-884-9190 Voice
1/202-755-7687 TDD

For more specific information about ADA requirements for telecommunications contact:

Federal Communications Commission

1919 M Street, NW
Washington, DC 20554
1/888-225-5322 Voice
202/632-6999 TDD

For more specific information about federal disability-related tax credits and deductions for business contact:

Internal Revenue Service

Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20044
1/800-829-1040